Supreme Court, U.S.
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No. 85-140

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

On August 3, 1982, Respondent Michael Hardwick, a 29-year-old gay man, was arrested and charged by the Atlanta Police Department with committing sodomy with another consenting adult in the bedroom of his home. The offense of sodomy, punishable by one to twenty years in prison, criminalizes "any sexual act involving the sex organs of one person and the mouth or anus of another." Official Code of Georgia Annotated (O.C.G.A.) § 16-6-2 (1984). The statute applies to all persons, whether single or married, heterosexual or homosexual.

Hardwick's case was heard by the Atlanta Municipal Court, and bound over to the Superior Court of Fulton County. However, the District Attorney's office has not presented the case to the grand jury, and has formally stated that, unless further evidence develops, the case will not be presented. Hence, there is no prosecution pending; but neither is there any criminal state court forum in which Hardwick can raise his constitutional claims. And, as Hardwick regularly engages in private homosexual acts, and will do so in the future, he, like all other homosexuals in Georgia, is in imminent danger of arrest, prosecution, and potential imprisonment.

On February 14, 1983, Hardwick, together with John and Mary Doe, a married couple who feared prosecution under the same statute, filed their complaint in Federal Court, seeking a declaratory judgment that O.C.G.A. § 16-6-2 (1984), as applied to private sexual conduct between consenting adults, is unconstitutional.

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SUMMARY OF ARGUMENT

The Eleventh Circuit correctly concluded that this Court's summary affirmance in *Doe v. Commonwealth's Attorney* was not binding precedent which required the dismissal of Hardwick's constitutional claims. That conclusion was based on well-established rules as to the limited precedential value of summary affirmances. Petitioner's contention that a summary affirmance without opinion was intended to resolve the complex constitutional question of privacy protection for homosexuals is rebutted by decisions of this Court issued subsequent to *Doe,* and by substantial authority from both state and federal courts that have considered the issue.

In its present procedural posture, the Hardwick case neither presents a ripe conflict with any other circuit nor frames an issue sufficiently concrete to merit this Court's attention. The Eleventh Circuit did not hold the challenged statute unconstitutional, but merely stated the appropriate constitutional standard in the abstract and remanded the case for trial. The instant case thus does not yet present a ripe conflict with the recent Fifth Circuit decision in *Baker v. Wade,* nor does it conflict with the D.C. Circuit decision in *Dronenburg v. Zech,* a military case not involving a challenge to the military sodomy law.

The Eleventh Circuit correctly found that the Georgia sodomy statute, to the extent that it sought to criminalize private sexual conduct between consenting homosexual adults, infringes upon the fundamental constitutional right to personal autonomy and privacy. The statute implicates important associational interests which cannot be impeded without a compelling state interest. In reaching its conclusion, the Eleventh Circuit properly applied precedent

regarding the right of privacy in intimate personal relationships to the specific factual situation presented by Hardwick.

The Eleventh Circuit decision in this case involves no unwarranted extensions of existing law, and in no way jeopardizes Georgia's ability to legislate in legitimate spheres of state regulation. The narrow constitutional right at issue here protects only private, consensual, sexual conduct between adults.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT DOE V. COMMONWEALTH'S ATTORNEY DOES NOT CONSTITUTE BINDING PRECEDENT.

After careful review, the Eleventh Circuit concluded that this Court's summary affirmance of *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), *aff'g mem*, 403 F. Supp. 1199 (E.D.Va. 1975), *reh'g denied*, 425 U.S. 985 (1976) was not binding precedent which required the dismissal of Hardwick's constitutional claims. In doing so, the Court applied well-established rules on the limited precedential value of such affirmances. That it reached the proper conclusion is supported by this Court's earlier decisions in *Carey v. Population Services*, 431 U.S. 678 (1977) and *New York v. Uplinger*, 58 N.Y.2d 936 (1983), *writ dismissed as improvidently granted*, — U.S. —, 104 S. Ct. 2332 (1984).

Defendants below had contended, and the District Court had agreed, that the summary affirmance in *Doe* precluded consideration of Plaintiff Hardwick's constitutional claims. The threshold issue on appeal thus became the meaning of *Doe*. While clearly acknowledging that a summary affirmance by the Supreme Court has binding precedential effect, *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), the Eleventh Circuit undertook the difficult task of identifying the precise limits of the summary affirmance in *Doe v. Commonwealth's Attorney*. The panel diligently applied the principles established in *Mandel v. Bradley*, 432 U.S. 173 (1977), *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 181-83 (1979) and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981), carefully examining both the jurisdictional statement and the facts in *Doe*. It concluded that the "most narrow plausible rationale for [this Court's] summary decision" in *Doe* was plaintiffs' lack of standing.[1] Accordingly, the Court held that the summary affirmance of *Doe* was not based upon, nor did it foreclose consideration of, the constitutional issues raised by Hardwick in the instant case.

Petitioner's contention that a summary affirmance without opinion was intended to resolve the complex con-

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[1] This Court, in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), employed the same reasoning in its discussion of the precedential effects of its summary affirmance in *Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1981). Plaintiffs in *City of Akron* challenged a statute identical to the one upheld in *Gary-Northwest*. In reversing the Sixth Circuit, this Court noted that an alternative ground for its summary affirmance in *Gary-Northwest* was plaintiffs' failure to prove that they were actually burdened by the challenged regulation, and that, accordingly, the decision did not constitute binding precedent on the merits.

stitutional question of privacy protection for homosexuals is rebutted by this Court's decisions in *Carey* and *Uplinger*, issued subsequent to *Doe*. Those cases demonstrate that the Eleventh Circuit analysis of the meaning of *Doe* was not based on mere "speculation" or "unwarranted assumptions", as the Petitioner contends, Petition for *Certiorari, Bowers v. Hardwick*, No. 85-140, at 5, and that the Eleventh Circuit properly performed its difficult task in defining the limits of *Doe*.

Footnotes 5 and 7 in *Carey* and the opinion dismissing *certiorari* in *Uplinger* clearly established that *Doe* is not binding precedent on the specific issues raised by Hardwick, and that sexual privacy between homosexuals is among the "important constitutional issues", *New York v. Uplinger*, 104 S.Ct. at 2334, which the Court has yet to definitively address. Indeed, as the panel correctly noted, those decisions constitute "doctrinal developments" sufficient in and of themselves to relieve lower Courts from any obligation to adhere to the reasoning of the three judge district court's decision in *Doe*. *Hardwick v. Bowers*, 760 F.2d 1202, 1209-1210 (11th Cir. 1985).

Other state and federal courts, when presented with this question, have taken the same view as the Eleventh Circuit on the meaning of *Doe v. Commonwealth's Attorney*. In a decision in which this Court denied *certiorari*, the New York Court of Appeals held that *Doe* was not an obstacle to declaring that homosexuals are covered under the constitutional right to privacy. *People v. Onofre*, 51 N.Y. 2d 476 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981). *See also State v. Saunders*, 75 N.J. 200, 381 A.2d 333, 341 (N.J. 1977); *Neville v. State*, 430 A.2d 570, 574 (Md. 1981). Similarly, the Tenth Circuit recently con-

cluded that "whether some private consensual homosexual activity is constitutionally protected appears to be an unsettled question." *Rich v. Secretary of the Army,* 735 F.2d 1220, 1228 n.8 (10th Cir. 1984). *See also Beller v. Middendorf,* 632 F.2d 788 (9th Cir. 1980). The Eastern District of Wisconsin also has noted that "the law remains unsettled" on whether private homosexual acts are protected by the right of privacy. *benShalom v. Secretary of Army,* 489 F.Supp. 964, 976 (E.D.Wis. 1980).

Thus, the conclusion reached by the Eleventh Circuit, that *Doe v. Commonwealth's Attorney* does not constitute binding precedent on the question of Hardwick's right to privacy, was eminently correct, and need not be examined by this Court.

II. THE ELEVENTH CIRCUIT HOLDING, WHICH LEAVES THE GEORGIA STATUTE IN PLACE PENDING DETERMINATION OF WHETHER IT IS JUSTIFIED BY A COMPELLING STATE INTEREST, NEITHER PRESENTS A RIPE CONFLICT WITH ANY OTHER CIRCUIT NOR FRAMES AN ISSUE SUFFICIENTLY CONCRETE TO MERIT THIS COURT'S ATTENTION.

In its present procedural posture, the *Hardwick* case neither presents a ripe conflict with any other circuit nor frames an issue sufficiently concrete to merit this Court's attention. After thorough analysis and discussion, the Eleventh Circuit properly concluded that *Doe v. Commonwealth's Attorney* was not binding on the merits, and that it was free to examine the substantial constitutional issues raised by *Hardwick.* The court did not hold the statute unconstitutional. It merely stated the appropriate constitutional test in the abstract, and remanded the case for trial.

The Eleventh Circuit held that in order to prevail at trial, Georgia must prove "a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest." *Hardwick v. Bowers,* 760 F.2d at 1213. Accordingly, review by this Court would be premature.

Petitioner's contention that the Eleventh Circuit decision creates a "conflict in the circuits", Petition for *Certiorari* at 8, with *Dronenburg v. Zech,* 741 F.2d 388, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984), is incorrect. *Dronenburg* was a military case, and the panel discussion of the precedential value of *Doe* was *dicta.*[2] Furthermore, the military regulation criminalizing private consensual sodomy was not even directly challenged in the case.

Nor is there yet a ripe conflict between the instant case and the recent Fifth Circuit decision in *Baker v. Wade,* — F.2d — (*en banc*), No. 82-1590 (5th Cir. Aug. 26, 1985). *Baker,* like the present case, involved a declaratory judg-

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[2] At issue in *Dronenburg* was the constitutionality of a naval discharge regulation, and not the military sodomy law. As noted by Judge Bork himself, author of the panel decision, the standard by which military regulations must be judged is much lower than in a civilian context:

> That the military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court.

741 F.2d at 1392.

Even on the precise issue of the meaning of Doe, other judges from the D.C. Circuit clearly disagreed with the panel view. Chief Judge Robinson, joined by Judges Wald, Mikva, and Edwards, determined, "we do not think that *Doe v. Commonwealth's Attorney* . . . is controlling precedent." *Dronenburg v. Zech,* 746 F.2d at 1580. (citations omitted).

ment challenge to the constitutionality of a state sodomy law. Unlike *Hardwick,* however, a full trial on the merits was held in *Baker,* after which a federal district court found the Texas sodomy law to be unconstitutional. *Baker v. Wade,* 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed,* 743 F.2d 236 (5th Cir. 1984). In *Hardwick,* the Eleventh Circuit has not struck down the challenged statute, but has instead remanded the case for trial with instructions as to the appropriate constitutional standards to apply. Therefore, the issues presented by *Hardwick* are not yet framed concretely, and there is no ripe conflict with *Baker.*[3]

III. THE FUNDAMENTAL CONSTITUTIONAL RIGHTS AT ISSUE IN HARDWICK V. BOWERS ARE WELL-ROOTED IN PRIOR CONSTITUTIONAL PRECEDENTS ON THE RIGHT OF PRIVACY AND DO NOT REQUIRE THIS COURT'S REVIEW.

The Eleventh Circuit found that Georgia sodomy statute, insofar as it sought to criminalize private sexual conduct between consenting homosexual adults, infringed upon Hardwick's fundamental constitutional right to personal autonomy and privacy. The statute, it held, implicated important intimate associational interests,[4] which could not be impeded without a compelling state interest.

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[3] The state virtually concedes that this case is in a premature posture for Supreme Court consideration because it brings the case before this Court on *certiorari.* Had the statute in fact been held unconstitutional, and thereby presented a ripe issue for review, an appeal pursuant to 28 U.S.C. § 1254(2) would be appropriate and the issues in the case would properly be before this Court.

[4] The First Amendment right of association aspect of this case was not presented in *Doe v. Commonwealth's Attorney,* and hence could not be deemed foreclosed even were the Eleventh Circuit's conclusion on the precedential value of *Doe* in error.

In reaching that conclusion, the Eleventh Circuit properly applied precedent regarding the right of privacy in intimate personal relationships to the factual situation presented by Hardwick. Its holding that the associational interests at issue fall within the protection of the Due Process clause of the Fourteenth Amendment construed in light of the Ninth Amendment was grounded firmly in this Court's recent decisions on privacy, including *Griswold v. Connecticut,* 381 U.S. 479 (1965), *Carey v. Population Services,* 431 U.S. 678, *Eisenstadt v. Baird,* 405 U.S. 438 (1972), and *Zablocki v. Redhail,* 434 U.S. 374 (1978). The opinion does not represent a departure from existing constitutional principles, as Petitioner contends, Petition for *Certiorari* at 8-12, but is, rather, the logical result of their application.

The full scope of the privacy right is as yet undefined. Its "outer limits" have not been established. *Carey v. Population Services, Inc.,* 431 U.S. at 684. However, this Court's decisions in *Carey* and *Eisenstadt* make it clear that the right of sexual privacy is the right of the individual to be free from unwarranted government intrusion into matters fundamentally affecting intimate personal decisions. Given the fact, as the Eleventh Circuit found in *Hardwick,* that "for some the sexual activity in question here serves the same purpose as the intimacy of marriage," 760 F.2d at 1212, there is no basis for excluding acts of sodomy carried out between consenting adults in private from the scope of constitutional protection.

Indeed, given the underlying purposes of the "associational" aspect of the privacy right, as explained by this Court in *Roberts v. United States Jaycees,* — U.S. —,

104 S. Ct. 3244 (1984), the conduct sought to be protected in *Hardwick* falls squarely within the ambit of the First Amendment:

> . . . choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. . .
>
> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. See, e.g. *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Services Int'l,* 431 U.S. 678, 684-6 (1977); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois,* 405 U.S. 645, 651-2 (1972); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

104 S. Ct. at 3249-50.

Moreover, the privacy rights previously recognized by this Court are not limited to marriage and family. As this Court stated in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 65 (1973):

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325 (1937); *Roe v. Wade,* 410 U.S. 113, 152 (1973). *This privacy right encompasses and protects the personal intimacies of*

> *the home,* the family, marriage, motherhood, procreation, and child rearing . . . [citing] *Stanley v. Georgia* . . . (emphasis supplied).[5]

It is significant that Hardwick was arrested for conduct which occurred in the privacy of his own bedroom. That arrest therefore implicated the heightened protections which come into play when a state attempts to regulate consensual intimate activities in the home, a "castle" historically protected from state interference. In light of this Court's decisions in *Payton v. New York,* 445 U.S. 573, 589-90 (1980), and *Stanley v. Georgia,* 394 U.S. 557 (1969), the Eleventh Circuit was compelled to conclude that the privacy interests articulated by Hardwick were of constitutional dimension. Whatever the State's power to regulate certain activities in public, the acts which underlie this case occurred in the home, and require a compelling governmental interest to justify intrusion upon them by the State.

Georgia's contention that the *Hardwick* decision, unless reviewed and reversed by this Court, will somehow wreak havoc in the courts and streets of Georgia and its

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[5] This Court went on, at footnote 13, to affirm the separate status of the privacy right in "personal intimacies of the home":

> The protection afforded by *Stanley v. Georgia,* 394 U.S. 557 (1969), is restricted to a place, the home. In contrast, the constitutionality protected privacy of family, marriage, motherhood, procreation and child rearing is not just concerned with a particular place, but with a protected intimate relationship.

413 U.S. at 66, n.13.

sister states is simply unfounded.[6] *Hardwick* involves no unwarranted extensions of existing law, and does not present the issue of Georgia's capacity to legislate in such spheres of regulation as suicide, drug abuse, prostitution or bigamy. As this Court noted in *Paris Adult Theatre I v. Slaton*, it is not for the courts "to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself." 413 U.S. at 60. The "rights protected by the Constitution" in this case are narrow. The only activity which the Eleventh Circuit has said is not a proper area for state regulation, absent a compelling state interest, is private, consensual sexual activity between adults.

The decision of the Eleventh Circuit was thus well-grounded in established constitutional principles, and contrary to Petitioner's assertion, does not involve the creation of any new rights. Accordingly, there is no basis for this Court's review.

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[6] The vast majority of the American population lives in reformed jurisdictions where consensual sodomy is not criminalized, and there is no indication that these states have been paralyzed in their ability to deal with legitimate areas of state regulation. The legislatures in twenty-two states have decriminalized private consensual homosexual acts: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington, West Virginia, Wisconsin, and Wyoming. In two other states, sodomy laws have been judicially declared unconstitutional: New York, *People v. Onofre*, 51 N.Y.2d 476; Pennsylvania, *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

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CONCLUSION

The decision of the Eleventh Circuit as to both the meaning of this Court's summary affirmance in *Doe v. Commonwealth's Attorney* and the constitutional standard by which Georgia's sodomy statute must be reviewed is eminently correct, and requires no review by this Court.

Accordingly, the petition for *certiorari* should be denied.

Respectfully submitted,

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